

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 58 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH and  
MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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DHOLIABHAI N RATHVA

Versus

STATE OF GUJARAT

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Appearance:

MR KR RAVAL for Petitioner  
MR VM PANCHOLI, APP for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH and  
MR.JUSTICE H.K.RATHOD  
Date of decision: 06/12/1999

ORAL JUDGEMENT

1. This appeal is directed against impugned judgment  
and order of conviction and life sentence dated 8/12/1989  
rendered by the Ld. Addl. Sessions Judge, Vadodara in

Sessions Case No. 41 of 1989. These are the facts of the prosecution case : Deceased Maganbhai Tetiya headed the family consisting of his grand sons Kaliyabhai Malkhabhai Rathva (complainant), Savajibhai Malkhabhai Rathva and Jeriva Malkhabhai Rathva. Their father became mentally ill and their mother had married with some other person. Hence, their grand father, deceased Maganbhai had given shelter to the accused, who happened to be their distant uncle. Accordingly, the accused and his wife Chhabudiben were living under the same roof. It has been alleged by the prosecution that accused was brought into the house with a view to see that the three young nephews were attended to. Accused had accordingly been residing with deceased Maganbhai for the last 10 years before the date of the incident, which is stated to have occurred on 14/6/1989. It then so happened that during the afternoon deceased Maganbhai Tetiya, accused Dholiyabhai Namlabhai and complainant Kaliyabhai were at home. The wife of the accused had gone for collecting Dodies of Mahuda tree. Hence, the accused had cooked the food. He had cooked maize loaves, vegetable (known as Kuvaliyani Bhaji) and Dal (soup) of pulses (Tuver). He had first taken his lunch. Thereafter deceased Maganbhai and complainant Kaliyabhai had taken their lunch. However, at that point of time accused informed that he would take his lunch after his wife would return home. The complainant, after taking his lunch, went to collect Dolis. He was feeling giddy and he also vomited. He, therefore, gradually walked down home at around 6 O'clock in the evening. He noticed that his grand father Maganbhai was also vomiting. He, therefore, offered water to Maganbhai, but he did not take it. In the meantime, his elder brother Savajibhai, who had gone to his father-in-law's place, returned home. He in the company of Savajibhai and other brother stayed near the kot on which Maganbhai was lying. They saw to Maganbhai taking tea. Thereafter, at around 4 O'clock in the morning of next day Maganbhai died. Complainant, therefore, went to inform Police Patel of the village who accompanied the complainant to his house. At that time the accused also reached home. Police Patel asked how that happened and accused informed that having become angry on account of he having been alleged of theft of goat, he had administered Rotex Rat Poison in the food which was taken by Maganbhai Tetiya, who died. It has been alleged that even the complainant felt giddy and vomitted. He, therefore, got himself admitted in a dispensary/hospital from where he voluntarily left after passage of couple of days. At the conclusion of investigation, the accused was chargesheeted and committed to Sessions Court for the offence punishable

u/Ss. 302, 307 and 201 of the Indian Penal Code (for short 'IPC'). He was accordingly charged to which he pleaded 'not guilty' stating that he was falsely implicated on the apprehension harboured by the complainant that he would grab the land of deceased Maganbhai.

2. At the conclusion of the Ld. Addl. Sessions Judge appreciating the evidence came to the conclusion that the accused administered aforesaid poison in the food which was taken by the deceased Maganbhai as well as the complainant. The Ld. Addl. Sessions Judge therefore, convicted the accused of the offence punishable u/S. 302 as also section 307 of the IPC and sentenced him to undergo life imprisonment on the first count and rigorous imprisonment for 7 years on the second count while imposing fine of Rs.200/- with default sentence of one month's rigorous imprisonment. That is how the accused is before this Court by way of this appeal moved through jail.

3. Mr. K.R. Raval, learned advocate has argued the cause of the accused by way of legal aid. Mr. V.M. Pancholi, Ld. A.P.P. has tried to support the impugned judgment and order. It might be noted from the impugned judgment that the Ld. Addl. Sessions Judge raised following points for determination for the purpose of scrutinising the facts and rendering his decision :-

- i. Does the prosecution prove the intention on the part of the accused of committing murder as alleged ?
- ii. Does the prosecution prove that the poison alleged to have been administered to deceased Maganbhai Tetiya has resulted into his death and does the prosecution prove that the accused has attempted to murder complainant Kaliyabhai ?
- iii. Does the prosecution prove that the poison which has resulted into the death was found from the possession of the accused ?
- iv. Does the prosecution prove that the accused had opportunity of administering the poison in question to deceased Maganbhai Tetiya and complainant Kaliyabhai ?
- v. Does the prosecution prove that the offences are attributed to the accused ?

The Ld. Addl. Sessions Judge has found first and third points in the affirmative upon totality of the evidence and the second and the fourth points in the affirmative. He has upheld the charge of sections 302 and 307 while

answering point no.5. We have set out the aforesaid points for determination raised by the Ld. Addl. Sessions Judge for the simple reason that we feel that the Ld. Addl. Sessions Judge has approached the matter from a reverse angle. In the present case certain facts are available in the prosecution evidence and certain facts are required to be ascertained from the circumstances placed on record. We would, therefore, proceed with the matter in the light in which it ought to be proceeded with.

4. It might be noted that the inquiry started from the FIR Exh. 15 dated 15/6/1989 in the form of a complaint given by the complainant. It might be noted from this document that the concerned Police Sub-Inspector of Chhota Udepur Police Station has made a note about statement made by the accused before police Patel, who had gone in the company of the complainant to the complainant's house as stated above. The statement so attributed to the accused is nothing but a confessional statement, if one looks at it. The statement would read as under :-

" [ Gujarati portion ]

(As stated in English the statement would read ) :

"So Dholiya (accused) informed that he was connected with theft of goat, as a result of which he became angry and poured rat killer poison in the food and that food was given to those people with an intention to kill, as a result of which Maganbhai Tetiya died."

It is settled law, and the pronouncement by this Court will be apt to be referred to, that such a statement having been made before the police Patel would be inadmissible in evidence. That is in the case of Sukhabhai Damjibhai Chaudhary v. State of Gujarat reported in 1985 G.L.H. p. 882 where a Division Bench of this Court held that any confession made before a police officer and that would include a police Patel within the meaning of sec. 25 of the Indian Evidence Act, would amount to a confession before a police officer and would be inadmissible in evidence in view of that provision. Therefore, evidence which has been placed on

record by the prosecution will necessarily have to be evaluated by excluding this statement alleged to have been made by the accused. The main evidence which leads to the prosecution story consists of oral testimony of the complainant appearing at exh. 14. He has been examined as prosecution witness no.2. He has given the facts which are not in dispute. However, the facts which are in dispute and which need be established by the prosecution are that the wife of the accused had gone for the work as aforesaid to the forest, that accused cooked the food on that day, that he had cooked maize loaves, vegetable (known as Kuvaliya's Bhaji) and Dal of pulses (Tuver), that the accused had taken his lunch before the food was given to the complainant and deceased Maganbhai, that deceased Maganbhai and complainant accordingly took the lunch and the complainant went for the collection of Dodies to the forest, that he there vomitted and, therefore, he returned home, that reaching home he saw his grand father Maganbhai Tetiya also vomiting at the place described as Mandva (shed nearby the house), that after some time Maganbhai was given tea, but he could not take it and that at 4.00 O'clock in the early morning of the next day he died. All these facts have been testified by the complainant. He has further stated that at that time the accused was at home. The complainant has in terms stated that they were administered poison and, therefore, they vomited. He has in terms stated that accused did that. He was admitted to the dispensary/hospital, but two days thereafter he voluntarily left ( ). He has also given complaint in the police by going to the place of the police Patel. The accused was not in the company of the complainant then. It was the rat killer poison which was administered to them. He then identified his thumb impression on the complaint (FIR) exh. 15. This is in short the evidence with which complainant introduced the facts. We notice that the attribution of administering poison is clearly feasible in this evidence. There is no question of inferring that fact. However, the complainant is not a witness to the actual mixing or pouring of the rat killer poison in the food by the accused. He has stated this fact from the subsequent incident. He has stated such facts also from the earlier incident. The earlier incidents are either not in dispute or cannot be disputed. Both the prosecution and defence are not in a position to dispute the fact that it was only the complainant, his grand father Maganbhai and the accused who were at home and the other two brothers were not at home. In our considered opinion this fact which cannot be disputed would assume importance when it comes to reaching the conclusion about nature of the offence

proved to have been committed by the accused.

5. Taking then to the cross-examination of the complainant, it has to be noted that the complainant has denied the fact that accused as well as his wife Chhabudi both had gone to the forest for collecting Dodies on the day of incident. The witness has asserted that they were at home. He has however admitted that the house in which they have been residing does not have electricity. He admitted the fact that rat killer poison is being kept in the house for the purpose of preventing rats eating away the foodgrains. He has admitted that accused did not take meals described by the word " " (maize loaves) whereas he and his grand father had taken the same. Commenting upon this admission Mr. Raval submitted that what the complainant wanted to say was that the accused must have mixed rat killer poison into the maize loaves. Yet, the investigation was directed for finding out the utensil in which 'Dal' (soup) was cooked. He denied the suggestion that when he returned home Chhabudi was eating the maize loaves. He admitted that he did not tell any body in the village about they having been administered rat killer poison. He also admitted that he was brought up by the accused and deceased Maganbhai, his grand father. He denied the suggestion that he was giving the name of the accused falsely in order to see that he would not grab their land. He denied the suggestion that accidentally the poison might have fallen into the utensil (in which the Dal was cooked). He admitted that in the roof made up of bamboos, they would hang cotton bag ( ). He also admitted that he did not personally see accused mixing or pouring rat killer poison into the food. He also did not see accused bringing that poison. He denied the suggestion that he did not tell about the incident to the village police Patel. He also admitted that they had taken their meals at around 3.00 O'clock in the afternoon. However, he has asserted that the accused did not take the meals. Pausing for a moment here, it has been submitted by word 'loaves' (Rotla ) it should be understood that the accused had taken his meals but he did not take the loaves. To this the Ld. A.P.P. submitted that the word 'loaves' (Rotla ) has been used by the witness consistently for describing taking of meals by the respective persons. Be that it may, it would clearly appear from the evidence that when the complainant and the deceased had taken their meals, the accused did not have the same simultaneously. This would be a very important circumstance to be taken into consideration at the time of ultimate conclusion. Proceeding further with the cross-examination the witness admitted that he returned home from the forest at around

4.00 O'clock in the afternoon as he felt giddy. He has admitted that when he reached home back deceased Maganbhai Tetiya was lying down on a cot. He, however, denied the suggestion that wife of the accused, Chhabudi, was taking her meals. He denied the suggestion that in order that the accused might not grab his land (the land that would go to the share of the complainant and his brothers) he falsely implicated the accused. He denied the suggestion that the rat poison might have accidentally fallen into the utensil in which Dal is cooked. He finally denied the suggestion that he did not talk about the incident to the police Patel of the village.

6. It might be noticed from the aforesaid evidence of the complainant that there were only three persons at the relevant point of time. They were the accused, the complainant and the deceased Maganbhai. Out of the three persons, two persons namely, the complainant and the deceased Maganbhai had taken their meals at the relevant point of time; whereas the accused had already taken his meals earlier to that. The symptoms from which the complainant and deceased suffered were also disclosed in the evidence of the complainant. They were giddiness and vomiting. The witness has deposed from his subsequent belief that the accused had administered rat poison through the food which complainant and deceased Maganbhai had taken. From all these circumstances appearing from the evidence of the complainant it would clearly appear that the administration of rat poison to the complainant and the deceased becomes attributable to the accused. The complainant has in terms deposed that there was no possibility of rat poison falling into the utensil meant for Dal accidentally and that in fact rat poison did not accidentally fall into the said utensil. It is this evidence which makes difference while appreciating all the circumstances in this case. From this evidence it can be seen that this is not a case merely of circumstantial evidence, but to an extent this is a case where there is some sort of positive attribution to the accused from the mouth of the complainant. We have to bear in mind this evidence while dealing with other pieces of evidence.

7. The complainant stands corroborated from the evidence of Dr. Narendra Purshottambhai Patel, P.W. 1, exh.6, who performed post mortem on the dead body of Maganbhai Tetiya. He gave his opinion that the cause of death was possible poisoning. He found that there was light yellowish liquid noticed in the stomach and it was throwing out foul smell. From this the witness doubted

about poisoning being the cause of death. He sent the samples from the stomach and small intestine in the first bottle, whereas he sent the samples from liver, spleen and kidney in the second bottle. He proved the post mortem report which is received in evidence at exh. 11. He has then referred to report of the Chemical Analyser appearing at exh. 12 by consent. From this he expressed his opinion that the samples contained Zinc Phosphide which is used in rat poison. He opined that that might cause death of a human being. He further deposed that he had occasion to examine the complainant at 12.30 in the afternoon on 14/6/1989 and he gave the history of having been administered rat poison in the food and complainant of stomach pain and vomiting. On his clinical examination no symptoms of poisoning could be noticed. Even during treatment no symptoms of poisoning could be noticed. He testified that the complainant left the hospital voluntarily (without he having been discharged from the hospital). He finally testified that no substance could be found upon stomach wash out. The case papers of the complainant were received in evidence at exh. 27.

8. The aforesaid medical evidence and the scientific reports clearly go to lend support to the complainant's evidence with regard to mixing of rat poison atleast in the food which deceased Maganbhai had taken. This corroborates the complainant's version and as also his say that he underwent similar symptoms on the day of incident. It is a different matter that when he himself got admitted in the hospital no symptoms could be traced out. That however, would assume importance when the question comes with regard to what would be the nature of offence that could be attributed to the accused.

9. Then there is the evidence of P.W. 3 Amtulla wife of Iqbalbhai Khabarali, exh.16, and P.W. 4 Iqbalbhai Khabarali, exh. 17. These are two witnesses from whom the accused was alleged to have purchased small rat poison packet. They have been examined by the prosecution for saying that the accused purchased the small packet of rat poison from the grocery shop run by the witnesses. In spite of the fact that the witnesses turned hostile, one thing is certain that the investigation was directed in the line of purchase of rat poison by the accused from the shop of Iqbalbhai located in village Joz. Witness Iqbalbhai Khabarali has in terms stated in his evidence that the police persons went to his shop for seizing packets of rat poison (in powder form). The respective Panch witnesses are Nazirbhai Khursidbhai, P.W. 7, exh. 20 and Hakimbhai Kadarbhai



Vora, P.W. 8, exh. 22. Even these witnesses turned hostile, but they have admitted having signed Panchnama exh. 21. Then there is evidence of other panch witnesses Katabhai Mansukhbhai and Gemabhai Ramsangbhai, P.W. 9 and 10, respectively Exhs. 23 and 25 in respect of Panchnama exh. 24. They admitted their thumb impressions on the Panchnama exh. 24 although they have turned hostile to the facts concerning the Panchnama. It would be important to note that evidence of the Investigating Officer will need appreciation bearing in mind the fact that the Panch witnesses turned hostile, but they admitted having become party to the Panchnamas in question. Before we proceed to appreciate the evidence of the Investigating Officer, we would like to deal with the evidence of another brother Savajibhai Malkhabhai, P.W. 5, exh. 18. He has deposed that he has been studying in P.T.C. college at Jamnagar. Complainant happens to be his younger brother. When the incident occurred he had been at his parents-in-laws' place on account of the fact that there was vacation in the college. Village Dungarbhit, where he had been the guest as aforesaid, is at a distance of 2 Kms. from the village where his grand father deceased Maganbhai Tetiya resided. His another younger brother Cheriya had gone to see him at around 4 O'clock in the afternoon and he informed the witness that some medicine had been administered and the grand father was unconscious. He also informed him that the accused had administered the poison in the food consisting of maize loaves and Dal of pulses (Tuver Dal). He has, however, stated in his examination-in-chief that the relation between the accused and his grand father Maganbhai Tetiya was cordial. Having been informed about the incident he went to his grand father's place where his grand father was lying in a kot and was expressing uneasiness and was almost in the state of unconsciousness. He has also deposed that the complainant was feeling giddy. At 4 O'clock in the early morning of the next day his grand father died. In his cross-examination he admitted his omissions with regard to what Cheriya, his younger brother, told him with regard to accused having administered medicines, when he went to see him. He admitted having not stated that his grand father told him when he reached there that accused had administered medicine to him and he was to die. In his further cross-examination in this respect he clarified that in the first instance his grand father was speaking and then he went unconscious. But he admitted his omission with regard thereto in his earlier statement. He also admitted that the accused brought up the witness and his two brothers and that the accused was attending to the

work of agriculture. He, however, denied the suggestion that in order that the accused might not grab their land, he was falsely implicated. Apart from the fact that there are certain omissions with regard to connecting the accused directly with the rat poison having been administered by him to the complainant and the complainant's grand father, the facts with regard to complainant and complainant's grand father having been under the symptoms of rat poison are also stated by this witness and he corroborates the complainant in that respect. It also appears from his evidence that subsequently he also must have come to know that the accused administered the rat poison. We, however, do not take into consideration the belief of the complainant as well as this witness about the accused having administered rat poison to the deceased and complainant. The circumstances which revolve round the incident in question clearly indicate involvement of the accused in the matter of rat poison going into the food which was taken by the deceased and the complainant and that food was cooked by the accused. There is another important circumstance throwing light on the incident and that is with regard to the accused having already had his meals earlier than the complainant and the deceased and if the rat poison had entered the food article/food articles accidentally, the accused would not have been spared from the symptoms thereof. This would clearly indicate that for some reasons the accused had an occasion to deal with the rat poison in the manner indicated by the prosecution.

10. P.W. 12 Manilal Purshotambhai Vasava, exh. 28, has testified to the prosecution story as it occurred subsequent to the filing of the FIR/complaint exh. 15. The witness has deposed that upon receipt of the complaint on 15/6/1989 he registered the offence and sent the complainant for treatment. He made the inquest Panchnama on the same day between 13.30 and 14.30 hours and sent the dead body for post mortem. Between 14.30 to 14.45 hours on the same day he visited the scene of offence and recovered 100 grams of earthen portion where the deceased vomited. He then recorded the statements of the witnesses (the complainant, Chhabudiben, wife of the accused, Dhiriya Bhanai, Bhaijibhai Rathva, Savajibhai Malkhabhai Rathva and others). At 17 hours the accused was arrested. Panchnama with regard to scene of offence and Panchnama of the utensil (used for the purpose of offence) came to be made as indicated in the evidence. This happened between 17.00 and 17.30 hours on the same day i.e. 15/6/1989. Thereafter on 20/6/1989 the aforesaid Panchnama with regard to purchase of rat poison

bags/packets from Iqbalbhai Khabarali was made and the statements were recorded. The recovered articles were sent for examination at the FSL. He has also deposed to the inquest Panchnama, exh. 7, scene of offence Panchnama exh.8 and the recovery of utensil (alleged to have been used for the offence) at exh. 24. He has also referred to the Panchnamas exhs. 10 and 21 and recording of the statements of the concerned witnesses. Referring to the statement of Amtullaben the witness has stated that she informed him that accused had purchased one rat poison packet (Padiki) from her. Nothing has been brought to light in the cross-examination of the witness except to suggest that he has himself written down the statements of the witnesses and panchnamas without going to the concerned site. This suggestion has been denied by the witness. In our considered opinion the evidence of the I.O would inspire confidence atleast on the question of he having investigated the matter in a particular manner. One important circumstance also surfaces from the evidence of this witness, that is with regard to purchase of one small packet (Padiki) of rat poison by the accused from witness Amtullaben, who attended the shop since her husband Iqbalbhai was not present at that point of time.

11. The reason for dealing with the prosecution evidence so elaborately is that the present cannot be said to be entirely a case of circumstantial evidence. It can be said to be a mixed case of positive evidence as well as circumstantial evidence. The involvement of the accused cannot be totally ruled out and the link is also established by the circumstances and chain of events. We have gone through the decisions which have been cited by Mr. Raval, learned advocate appearing for the cause of the appellant. In Ramgopal v. State of Maharashtra reported in 1972 CRI.L.J. 473 ( AIR 1972 S.C. 656), the Apex Court has said in para. 16 that in a case of death by poisoning it is only when the motive is there and it is proved, that the deceased died of the poison in question, that the accused had that poison in his possession and that he had an opportunity to administer the poison to the deceased that the Court can infer that the accused administered the poison to the deceased resulting in his death. This would be true, as in the case before the Apex Court, where only the circumstantial evidence is to be considered. In the second decision in the case of Phino v. State of Punjab reported in AIR 1975 S.C. 1327 it was found that the prosecution failed to prove beyond reasonable doubt that the appellant administered poison to Ranjit Singh with the intention of

causing his death or that he has died as a result of the said poisoning. The Apex Court observed that in a situation where two views are possible, the order of acquittal recorded by the trial Court in favour of the appellant can hardly be disturbed. The Apex Court, therefore, set aside the conviction and sentence of the appellant u/S. 302 of the IPC, but maintained it u/S. 328. Mr. Raval also referred to a decision in the case of Sharad v. State of Maharashtra reported in AIR 1984 S.C. 1622. There can be no different view from the settled position of law in the matter of appreciation of circumstantial evidence. We would, however, reproduce the observations appearing in head notes D and E as under as the said head notes have been read before us :-

"(D). It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. Where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a Court.

Before a false explanation can be used as additional link, the following essential conditions must be satisfied :

- (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.
- (2) the said circumstances point to the guilt of the accused with reasonable definiteness, and
- (3) the circumstance is in proximity to the time and situation.

If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise.

(E) The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be

fully established :

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (3) the circumstances should be of a conclusive nature and tendency.
- (4) they should exclude every possible hypothesis except the one to be proved, and
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities the act must have been done by the accused.

A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction."

The test in the present case is with regard to facts and circumstances as also nature of the evidence which we have presently discussed. There is no possibility of rat poison powder in a small packet form falling into the utensil in which food was cooked. If that had really happened, even the accused would have been down with the symptoms of rat poison. That is how the accused stand connected with the incident in question. No case of motive could be suggested by the prosecution witnesses de-hors the inadmissible confessional statement appearing in the FIR. But the witness did suggest something what was not at all there. It was suggested to the witnesses as well as in the further statement of the accused that in order that the accused might not grab the land he was falsely implicated. There is no incident from which it could be suggested that there was any effort on the part of the accused to do so so that the complainant party could legitimately apprehend grabbing of land by the accused. The relations were quite cordial and there must have been some incident that must have enraged the

accused in seeing that he used one small packet of rat poison.

12. It is here that the question with regard to whether the accused intended to cause death of deceased Maganbhai Tetiya would arise. The Ld. trial Judge has convicted the accused of the offences punishable u/S. 302 of the IPC, but we find absence of any material pointing at his positive intention and such an intention could not be gathered from any of the circumstances which point at nothing more possible or probable than anger and enragement at something that might have happened between the accused on one side and the complainant and his grand father on the other side. Besides, the accused is a rustic villager and it would be impossible to presume that he knew what would be the required doze of rat poison for killing a person. Thus, he in fact did cause hurt by administration of poison and in fact as a result of his act, the aged person died on the next day. Neither intention to kill nor knowledge that his act would result into the death can be attributed to the accused in the absence of any circumstance. The circumstances which can be noticed from the evidence indicate to an extent absence of such an intention on the part of the accused. The relations deposed to have been cordial so far as parties including accused are concerned. It is here that the decision in the case of State of Bihar v. Ramnath Prasad reported in AIR 1998 S.C. 466 referred to by Mr. Raval would assume importance. The Supreme Court has observed as under :-

"13. The next question to be considered is what offence Ramnath can be said to have committed. The prosecution has not been able to establish any motive strong enough to induce Ramnath to kill any of those five persons even if some enmity with Bishwanath Prasad Rajgaria is assumed. He did not have any enmity with others. If really his intention was to kill them he would not have given that poisonous substance so openly and in presence of others. It is, therefore, not possible to infer from the facts and circumstances of the case that Ramnath had given the same to Bishwanath Prasad with any intention to cause his death. However, he ought to have known that as what he had given to Bishwanath Prasad Rajgaria and others was a poisonous substance, it was likely to cause grievous hurt and even death.

14. We, therefore, hold him guilty for

committing the offence punishable under S. 304, Part II, I.P.C. for causing the death of Bishwanath Prasad Rajgaria and for the offence punishable under S. 326, I.P.C. for causing grievous hurt to Bigu Ram, Ram Narayan Prasad, Ram Gopal Prasad Rajgaria, Jagannath Prasad and Hari Narayan."

Under the aforesaid circumstances the Supreme Court held the accused before it guilty for committing offence u/S. 304 Part-II of the IPC and for the offence u/S. 326 of the IPC. Although the fact situation cannot be similar qualitatively, the propositions can be applied to the present case. We, therefore, find that the conviction of the accused u/Ss. 302 and 307 of the IPC deserves to be altered to respectively u/Ss. 304, Part-II and 328 of the IPC. In respect of the offence punishable u/S. 328 of the IPC the maximum sentence is rigorous imprisonment for 10 years, whereas in respect of offence punishable u/S. 304, part-II, the maximum sentence is also 10 years. It has been jointly submitted that the accused has already undergone more than 10 years of sentence by this point of time. We, therefore, pass following order :-

The conviction of the accused is hereby altered from that u/Ss. 302 and 307 of the IPC to Sections 304, Part-II and 328 of the IPC and the sentence under both the provisions will have to be directed to have run concurrently. The accused having already undergone more than 10 years of rigorous imprisonment by this point of time, we direct the sentence as one already undergone. This appeal is partly allowed accordingly. If the accused is now not required for any other case, he shall be set at liberty forthwith.

\* \* \*

PVR.